Tan Swee Thiam v United Overseas Bank (M) Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(A)-584–03 OF 2017, B-02(IM)-1736–08 OF 2017 AND B-02(IM)-1737–08 OF 2017
HAMID SULTAN, ABDUL RAHMAN SEBLI AND MARY LIM JJCA
18 JUNE 2019

Land Law — Charge — Order for sale — Whether chargor had shown 'cause to the contrary' — Whether after accepting redemption sum for the charged property, chargee should not have applied for order for sale even though it had to forward redemption sum to insolvency department on account of chargor's bankruptcy — Whether High Court should have allowed chargor's application to set aside the order for sale — National Land Code s 256

The appeals herein concerned the making of an order for sale by the High Court under s 256 of the National Land Code ('the NLC') of a property belonging to the appellant ('Tan') that was charged to the respondent ('UOB') to secure loans granted to him. When Tan was adjudged a bankrupt, he found out what the redemption sum for the property was and fully paid the sum to UOB using his wife's funds. Attaching a notice of redemption to his solicitor's letter to UOB, Tan informed UOB that the property had been fully redeemed and that his solicitor would be attending to the discharge of the charge. The notice of redemption contained Tan's latest address which was the address of the property. UOB did not respond to Tan's letter but about 2 1/2 years later obtained an order to sell the property by way of public auction. Tan had no knowledge of the court proceedings. An officer from the insolvency department had attended court and had not objected to UOB's application for the order for sale. When Tan found a notice of public auction of the property in his letterbox, he sought clarification from UOB but they were not co-operative. Tan wrote to UOB through his solicitors to call off the auction, but did not receive any response. Tan then applied to set aside the order for sale but his application was dismissed. It was only from the affidavits filed in those proceedings that Tan discovered that he had been kept in the dark because UOB had been sending all their correspondence to him to his old office address; that UOB that kept the redemption sum for about ten months before seeking the permission of the Director-General of Insolvency ('the DGI') to kept the redemption sum and treat the loans as settled and the property as redeemed; that only after UOB had remitted the redemption sum to the DGI as requested by the latter did UOB apply for the order for sale. Tan contended that despite showing 'cause to the contrary' as to why the order for sale should not have been made in the first place, the High Court judge dismissed his

application to set aside the order for sale. The instant appeal was against that decision. A

Held, allowing the appeal and setting aside the High Court's decision:

(1) Having relied on the notice of redemption and having accepted payment for which UOB sought the DGI's agreement to keep the payment and treat the loan as redeemed and the charge as lifted, good conscience and the rules of equity militated against the granting of UOB's application for an order for sale of the property. These were strong and compelling reasons to justify the withholding of the relief sought under s 256 of the NLC (see para 38). B C

(2) The evidence showed that the redemption sum was fully paid up, that UOB had every intention of lifting the charge and that it kept the redemption sum for a substantial period before approaching the DGI to sanction its actions. After failing to procure the DGI's sanction, UOB never advised Tan or his wife about the state of affairs. It even failed to respond to Tan's letters. UOB relied on Tan's last known address as indicated in the loan documents even though it had received the notice of redemption containing Tan's latest address. UOB must therefore be taken to have been aware of that latest address or, at least, put on notice in that regard (see paras 37 & 41). D E

(3) While the procedure under s 256 was meant to be speedy and summary in nature, a judge hearing an application for an order for sale must nevertheless be concerned as to whether the chargor had been properly served, that the procedural requirements of O 83 of the Rules of Court had been complied with, and whether the factual material produced before him by the chargor constituted cause to the contrary as to why the relief under s 256 ought to be withheld from the applicant. All these were not observed in the instant case (see paras 39–40). F G

[Bahasa Malaysia summary

Rayuan-rayuan ini berkenaan membuat perintah jualan oleh Mahkamah Tinggi di bawah s 256 Kanun Tanah Negara ('KTN') harta milik perayu ('Tan') yang dicagar kepada responden ('UOB') untuk menjamin pinjaman yang diberikan kepadanya. Apabila Tan telah diputuskan bankrap, dia mengetahui jumlah penebusan bagi harta tersebut dan membayar sepenuhnya jumlah tersebut kepada UOB menggunakan dana isteri beliau. Mengemukakan notis penebusan kepada surat peguamnya kepada UOB, Tan memaklumkan kepada UOB bahawa harta tersebut telah ditebus sepenuhnya dan peguamnya akan menghadiri pelepasan cagaran tersebut. Notis penebusan itu mengandungi alamat terkini Tan yang merupakan alamat harta tersebut. UOB tidak memberi maklum balas kepada surat Tan tapi kira-kira 2 1/2 tahun kemudian memperoleh satu perintah untuk menjual harta itu melalui lelongan awam. H I

Tan tidak mengetahui prosiding mahkamah tersebut. Seorang pegawai dari Jabatan Insolvensi telah menghadiri mahkamah dan tidak membantah permohonan UOB untuk perintah jualan. Apabila Tan mendapati notis lelongan awam harta itu di dalam kotak suratnya, beliau meminta penjelasan dari UOB tetapi mereka tidak bekerjasama. Tan menulis kepada UOB melalui peguamnya untuk membatalkan lelongan itu, tetapi tidak menerima apa-apa jawapan. Tan kemudian memohon untuk mengetepikan perintah jualan tetapi permohonannya ditolak. Hanya daripada afidavit yang difailkan dalam prosiding itu Tan mendapati bahawa dia telah tidak diberitahu kerana UOB menghantar semua surat-menyurat mereka kepadanya ke alamat pejabat lamanya; bahawa UOB yang menyimpan jumlah penebusan itu selama kira-kira sepuluh bulan sebelum mendapatkan izin Ketua Pengarah Insolvensi ('KPI') untuk menyimpan jumlah penebusan dan menganggap pinjaman sebagai selesai dan harta sebagai ditebus; bahawa hanya selepas UOB telah mengembalikan jumlah penebusan kepada KPI seperti yang diminta oleh kedua UOB memohon perintah untuk jualan. Tan menegaskan bahawa walaupun menunjukkan 'cause to the contrary' mengapa perintah jualan itu tidak sepatutnya dibuat, hakim Mahkamah Tinggi menolak permohonannya untuk mengetepikan perintah jualan. Rayuan ini terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Setelah bergantung pada notis penebusan dan menerima pembayaran yang mana UOB memohon persetujuan KPI untuk menyimpan bayaran dan menganggap pinjaman sebagai ditebus dan cagaran sebagai diangkat, hati nurani yang baik dan peraturan ekuiti menghalang terhadap pemberian permohonan UOB untuk perintah jualan harta itu. Ini adalah sebab-sebab yang kukuh dan penting untuk membenarkan penangguhan relif yang dipohon di bawah s 256 KTN (lihat perenggan 38).

(2) Keterangan menunjukkan bahawa jumlah penebusan itu telah dibayar sepenuhnya, bahawa UOB mempunyai niat untuk mengangkat cagaran itu dan bahawa ia menyimpan jumlah penebusan untuk tempoh yang besar sebelum mendekati KPI untuk membenarkan tindakannya. Selepas gagal mendapatkan kebenaran KPI, UOB tidak pernah menasihatkan Tan atau isterinya mengenai keadaan yang berlaku. Ia juga gagal membalas surat-surat Tan. UOB bergantung kepada alamat terakhir Tan seperti yang ditunjukkan dalam dokumen pinjaman walaupun ia telah menerima notis penebusan yang mengandungi alamat terbaru Tan. Oleh itu, UOB perlu perlu menyedari alamat terkini itu atau, sekurang-kurangnya, memberi notis dalam hal itu (lihat perenggan 37 & 41).

(3) Walaupun prosedur di bawah s 256 dimaksudkan untuk menjadi cepat dan ringkas, seorang hakim yang mendengar permohonan untuk satu

perintah jualan mestilah mengambil berat sama ada penggadai telah disampaikan dengan betul, bahawa kehendak prosedur A 83 Kaedah-Kaedah Mahkamah telah dipatuhi, dan sama ada material faktual yang ditunjukkan di hadapannya oleh penggadai merupakan cause to the contrary berkenaan mengapa relif di bawah s 256 sepatutnya ditahan daripada pemohon. Semua ini tidak diperhatikan dalam kes ini (lihat perenggan 39–40).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2917–3094.

Cases referred to

Barclays Bank v Quistclose Investments, Ltd [1968] 3 All ER 651, HL (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70; [1970] 1 MLRA 219, FC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, FC (refd)
Murugappa Chettiar v Letchumanan Chettiar [1939] 1 MLJ 296 (folld)
Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa & Anor (Goh Ah Chwee & Anor interveners) [1989] 1 MLJ 261, HC (refd)
Public Finance Bhd v Narayanasamy [1971] 2 MLJ 32, FC (refd)

Legislation referred to

Bankruptcy Act 1967 (now the Insolvency Act 1967) ss 8(2), 82(a), 115(2)
Court of Appeal Rules 1994 r 7(3A)
National Land Code ss 256, 256(3), 340, Form 16D
Rules of Court 2012 O 83

Appeal from: Originating Summons No BA-24FC-190–02 of 2016 (High Court, Shah Alam)

Ong Keh Keong (Ong Partnership) for the appellant.
Chua Por Ron (Mohd Hisyam Hilmi bin Abd Rahman with him) (Chua & Patners) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] All three appeals arose from the same proceedings at the High Court wherein the respondent obtained an order for a judicial sale of land belonging to the appellant. The appeals are:

(a) Civil Appeal No B-02(A)-584–03 of 2017 — this appeal is against the decision of the High Court granting the respondent's application for an order for sale of the appellant's property dated 21 April 2016;

(b) Civil Appeal No B-02(IM)-1736–08 of 2017 — this appeal is against the dismissal of the appellant's application to set aside the order for sale; and

(c) Civil Appeal No B-02(IM)-1737–08 of 2017 — this appeal is against the dismissal of the appellant's application for an extension of time to file an affidavit in reply in the proceedings to set aside the order for sale.

[2] The circumstances leading to these appeals are these.

[3] On 21 April 2016, the High Court granted the respondent's application made pursuant to s 256 of the National Land Code for an order of sale of certain charged property. The appellant had obtained a housing loan of RM199,000 ('the housing loan') and a fixed loan of RM44,000, both loans totaling RM243,000 from the respondent. As security, the appellant had granted a charge in favour of the respondent, his property held under title HS(D) 123251, PT 1450, Mukim Damansara, Daerah Petaling, Negeri Selangor ('the said property'). We were led to understand that the appellant and his family live on the said property.

[4] On 4 September 2013, the appellant was adjudged a bankrupt by the High Court at Shah Alam. The housing loan consequently went into default. That is not in dispute.

[5] The respondent's application for an order for sale was granted on 21 April 2016. The appellant did not attend the hearing of the respondent's application but an officer from the insolvency department was present. The officer did not object to the respondent's application. The first appeal is in respect of the order for sale.

[6] Separately, the appellant filed an application to set aside the order for sale. That application was dismissed on 24 July 2017, and this forms the basis for the second appeal.

[7] At the hearing of the appellant's application to set aside the order for sale, the appellant had filed an application for an extension of time to file an affidavit in reply. That application was also dismissed, on 24 July 2017. The third appeal is in respect of this decision.

[8] Given that the appellant is an undischarged bankrupt, the sanction of the Director General of Insolvency was required for the conduct of the appeals. At the first hearing of these appeals, that is, on 9 February 2018, sanction had only

been granted in respect of the first appeal. On 5 October 2018, the appellant withdrew the second and third appeals. Consequently, these two appeals were struck out with no order as to costs. Deposits were refunded to the Director General of Insolvency.

[9] The central issue in respect of the first and now, only appeal before us, is whether the learned judge had erred in law and on the facts, in granting the order for sale pursuant to s 256 of the National Land Code. The appellant's contention is that he has successfully shown cause to the contrary as to why the order for sale ought not to have been granted in the first place and that the learned judge had erred in not acceding to his submissions.

[10] According to the appellant, around the time he was adjudged a bankrupt in September 2013, he had approached and met with one Mr Stanley, a manager for the respondent's branch at Puchong to discuss the settlement of his outstanding loans on the said property. He sought to redeem the said property.

[11] The appellant was informed by this Mr Stanley that the outstanding sum was RM145,283.64 for the housing loan and a sum of RM32,396.41 for the fixed loan. Relying on Mr Stanley's statements and representations, the appellant borrowed money from his wife, Ong Beng Koon towards settling his loans with the respondent. On 11 Ocotber 2013, the appellant's wife, fully paid off both outstanding sums, that is, the redemption sum of RM177,680.05 ('the redemption sum'). The bank-in slip of the payment was adduced in evidence.

[12] On 16 October 2013, the appellant, through his solicitors, Messrs Ong Partnership informed the respondent that the said property had been redeemed and that his solicitors would be attending to the discharge of the charge. A notice of redemption dated 14 October 2013 was enclosed in Messrs Ong Partnership's letter to the respondent. In that notice, the appellant gave his latest address which was the address of the said property. There was no response from the respondent.

[13] Four years later, on 27 February 2017, the appellant learnt from a letter sent by Shrudy Resources that was put in his letterbox that the said property would be sold at a public auction on 8 March 2017 pursuant to a court order for sale (see p 27 of the record of appeal). According to the appellant, he quickly met with the respondent to seek clarification as regards the auction but the respondent was not forthcoming or co-operating. He then found out that the respondent had been sending all correspondence and letters to his old office address, and he claimed that he had never received any of them.

[14] On 1 March 2017, the appellant's solicitors wrote to the respondent to call off the auction pending clarification of the whole matter since the appellant had already paid the full settlement. There was no reply from the respondent. On 7 March 2017, the appellant appealed against the order for sale granted on 21 April 2016.

[15] It was the contention of the appellant that he had shown cause to the contrary as to why the order of sale should not have been granted in the first place. There was evidence to the effect that the outstanding loans had been settled at the material time. Gathering from the affidavits filed in response to this matter, the appellant contended that the payment of the outstanding sums is actually confirmed by the respondent in that the respondent had itself written on 28 August 2014 to the DGI for consent to keep the monies paid, treat the related loans settled and the said property redeemed.

[16] The DGI did not reply till 13 February 2015. And, it was only upon the DGI's reply to the effect that any sale via private treaties would not be permitted and that the respondent's request to retain the monies paid was rejected that the respondent then returned the monies paid, to the DGI. Even then, it was not until the respondent's solicitors had enquired with the DGI as to whether it should return the monies paid to the appellant's wife, Ong Beng Koon or to remit the monies to the DGI. On 13 July 2015, the DGI requested the redemption sum to be forwarded to its department. This was attended to by the respondent on 4 September 2015. On 19 February 2016, the respondent then commenced the ad rem proceedings under s 256 of the National Land Code.

[17] It was the contention of the appellant that at all material time, the respondent was fully aware that the redemption sum belongs to the appellant's wife and that despite such knowledge had forwarded the redemption sum to the DGI. Against this factual backdrop, the appellant contended that he had shown cause to the contrary under s 256(3) and following the Supreme Court decision in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36, the order of sale ought to have been set aside.

[18] In allowing the application for an order for a judicial sale, the learned judge neither alluded to nor dealt with any of the matters raised by the appellant. In fact, the learned judge said nothing about what was raised by the appellant in any of the ten paragraphs of the grounds of decision. Instead, the learned judge pointed out:

(a) the state of insolvency of the appellant;

(b) that the appellant was in default of the loans following his being adjudged a bankrupt;

(c) that Form 16D had been duly served on the appellant at his last known address and with the DGI under s 82(a) of the Bankruptcy Act;

(d) that the appellant had not complied with Form 16D;

(e) that on the day of the hearing on 21 April 2016, the DGI had attended proceedings and had confirmed that the appellant had attended before the DGI;

(f) that the officer from the DGI's department had not objected to the respondent's application; and

(g) that the respondent's application was in order.

[19] Following the above findings, the learned judge granted the respondent's application and ordered that the said property be sold at a public auction on 22 August 2016. That date was subsequently rescheduled for 8 March 2017. Nothing was said nor any deliberations conducted as to the contentions of the appellant.

[20] At the hearing of this appeal, the respondent had filed by way of encl 15a, an application to introduce as fresh and further evidence, the following:

(a) letter dated 2 January 2018 from the Director General of Insolvency (Selangor) ('DGI's letter');

(b) valuation report dated 11 May 2016 by KPH Property Consultants (KL) Sdn Bhd;

(c) affidavit filed by the respondent explaining the remittance of the sum of RM177,680.05 on 15 September 2015 which sum was paid on 11 October 2015; and

(d) decision of the High Court in BA-24FC-190–02 of 2016.

[21] It was the submission of learned counsel for the respondent that all the above four pieces of evidence arose consequent to the appeal in which case, the application ought to be allowed under r 7(3A) of the Court of Appeal Rules 1994; and further, that the test laid down in *Ladd v Marshall* [1954] 3 All ER 745 and endorsed by the Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70; [1970] 1 MLRA 219, has also been met. These pieces of fresh evidence are argued to have a high influence on the appeal and also in the earlier application for an order for sale if they were put before the High Court at the material time.

[22] The DGI's letter of 2 January 2018 is intended to show that contrary to the appellant's contention that the appeal was to 'save an old man's house from

auction', in view of the appellant's total debt, that fate is unavoidable or inevitable. According to the contents of the letter, three bankruptcy orders had been granted pursuant to separate applications made by three different creditors, namely UOB (M) Bhd, RHB Bank Bhd and CIMB Bank Bhd. 11 creditors have since lodged their respective proofs of debt and the total debt outstanding from the appellant is RM3,391,844.49. It was said that there were other creditors awaiting to be paid from the surplus of the proceeds of sale.

[23] As for the valuation report, it revealed that the market price of the said property was RM750,000. As the sum owed to the respondent is RM177,680.05, there will be surplus from the intended auction sale. That surplus will be forwarded to DGI for distribution to other creditors.

[24] The third piece of evidence is an affidavit proposed by the respondent explaining why the sum of RM177,680.05 paid on 11 October 2013 was only remitted to the DGI on 15 September 2015.

[25] The fourth and final piece of evidence is the decision of the High Court dismissing the application to set aside the order for sale. Since the facts and issues are the same, the evidence ought to be admitted.

[26] The application was opposed by the appellant, primarily on the basis that the conditions of r 7(3A) and *Ladd v Marshall* have not been met and that there was abuse of the procedure in r 7(3A).

[27] In respect of the respondent's application to introduce the four pieces of new evidence, which upon hearing the parties, we decided would be dealt with together with the main appeal, we find merit in the application. These pieces of evidence are of relevance and assistance in this appeal, and in fact are evidence that arose after the decision appealed against. The respondent's application in encl 15a is therefore allowed.

[28] As for the main appeal, we also found merit in the appellant's appeal. Indeed, there was ample evidence to the contrary that the learned judge at the High Court failed to consider, as clearly evident from the reasoning presented in this appeal. In the locus classicus decision on s 256 of the National Land Code of *Low Lee Lian*, the Supreme Court explained what the term 'cause to the contrary' meant. It opined through the clear judgment of Gopal Sri Ram JCA (as he then was) that 'cause to the contrary' within s 256(3) may be established only in three categories of cases:

> First, it may be taken as settled that a chargor who is able to being his case within the exceptions to the indefeasibility doctrine housed in s 340 of the Code establishes cause to the contrary ...

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) above will be held to have established cause to the contrary under s 256(3). The decision of Smith J in *Subchent Kaur v Chai Sau Kian* [1958] 1 MLJ 32, of the former Federal Court in *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the charge to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v Letchumanan Chettiar* [1939] 1 MLJ 296 at p 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a Chargor, who shows that there would be no need to sell his land if the chargee has been paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a charger may 'shew cause' either in law or in equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

[29] After further examination of the facts and reasonings in *Murugappa Chettiar v Letchumanan Chettiar* [1939] 1 MLJ 296 and the Privy Council decision in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457, the Supreme Court went on to conclude as follows:

> It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar*'s case, the chargor must be able to point to a statutory direction or some rule of common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s 256(3) ...

[30] The Supreme Court reminded of the distinction between rights ad rem and rights in personam. The action to set aside a charge upon one or more grounds of defeasibility under s 340 of the National Land Code is an action in rem. In the opinion of the Supreme Court:

> For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action in personam. The consequences of succeeding in such an action will have the effect of getting the chargee to defeat his own title or of depriving him of some or all of his rights under the registered charge, including the right to obtain an order for sale. See *Oh Hiam & Ors v Than Kong* [1980] 2 MLJ 159. Of course, it is not incumbent upon the chargor to bring an action to enforce the obligation of conscience operating against the chargee. He may, by establishing such an obligation of conscience, rely upon it to thwart an application under s 256 of the Code.

[31] The Supreme Court then went on to illustrate by reference to the cases of *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32 and *Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa & Anor (Goh Ah Chwee & Anor interveners)* [1989] 1 MLJ 261, what would fall within the principle in *Murugappa Chettiar*'s case that would amount to strong and compelling reasons to justify the withholding of the relief under s 256. To act in the absence of such conditions 'would be to ignore the mandatory language of s 256(3) read with s 340 of the Code'.

[32] On the facts and circumstances in this appeal, we are strongly compelled to intervene not because we feel 'sorry for the borrower' or because we regard 'the lender as arrogant, boorish or mannerly', but entirely because the principle in *Murugappa Chettiar*'s case applies in the factual context of the allegations raised. The allegations were not mere allegations but were of merit, confirmed by the respondent's own actions. The payment of the redemption sum at the material time is not at all imagined. It is confirmed by the respondent's own affidavits and letters sent at the material time to the DGI — see para 10 of the respondent's affidavit in reply and pp 48–50, 55–68 of the record of appeal.

[33] We find the contents of the correspondence highly relevant and instructive as to the intent and decisions of the respondent. In its solicitors' letter to the DGI, the respondent, inter alia, stated:

> 3. Menurut permintaan Penghutang Penghakiman, UOBM telah memaklumkan kepada Penghutang Penghakiman bahawa jumlah amaun penebusan Hartanah tersebut adalah RM177,680.05 ('Amaun Tertunggak') dan Penghutang

Penghakiman telah pada 11.10.2013 membayar Amaun Tertunggak tersebut melalui mesin deposit cek UOBM. Semasa pemprosesan pembayaran tersebut, UOBM menyedari bahawa Penghutang Penghakiman telahpun dihukum bankrap pada 4.9.2013.

4. Memandangkan pembayaran Amaun Tertunggak tersebut berlaku selepas Penhutang Penghakiman telah diisytiharkan bankrap, kami dengan sesungguhnya percaya bahawa sanksi atau persetujuan pihak Tuan berkenaan dengan pembayaran Amaun Tertunggak dan penebusan Hartanah tersebut adalah diperlukan.

5. Kami melampirkan bersama surat ini salinan-salinan dokumen-dokumen yang berkenaan dengan Hartanah tersebut, untuk rujukan and rekod pihak Tuan.

6. Sekiranya pihak Tuan bersetuju dan tidak mempunyai sebarang bantahan berkenaan dengan pembayaran Amaun Tertunggak dan penebusan Hartanah tersebut, UOBM akan melepaskan gadaian yang didaftarkan bagi manfat UOBM atas Hartanah tersebut dan kami akan memajukan dokumen-dokumen asal yang berkaitan dengan Hartanah tersebut kepada pihak Tuan, untuk tindakan lanjutan pihak Tuan.

7. Semoga pihak Tuan dapat memberi maklum balas dengan kadar yang segera.

[34] The above letter reveals not only the respondent's acceptance of payment and settlement of the redemption sum, but shows complacency on the part of the respondent in that there was a prolonged lapse of time between the acceptance of payment before the respondent started its line of inquiry with the office of the DGI and before the respondent finally forwarded the payment of the redemption sum to the DGI. The letter further reveals the respondent's decision and intention to lift the charge on the said property, that it was merely seeking the DGI's sanction for its actions and decisions because the appellant had been adjudged a bankrupt.

[35] DGI did not reply immediately. Its office replied the respondent's letter of 28 August 2014 letter on 13 February 2015. Aside from telling the respondent that its office does not handle sales by way of private treaties, it reminded the respondent of its rights as chargee under s 8(2) of the Bankruptcy Act 1967 and the National Land Code; that it will not object to the enforcement of such rights, that the respondent was not to receive any direct payment from the appellant in settlement of his loans with the respondent as such action would contravene s 115(2) of the Bankruptcy Act 1967.

[36] Bearing in mind that the insolvent state of the appellant was upon the respondent's own petition — see bankruptcy search result at p 18 of the record of appeal, that the respondent is not a private individual but an institution whose business is to lend money and hold as securities or collateral for such loans landed properties such as the said property, that it was advised by legal counsel at all times, we are surprised, to put it mildly, that the respondent can

refer to these various actions as not being in the least prejudicial to the rights and interests of the appellant as the outstanding loans had still not been settled — see para 12 of affidavit in reply at p 50 of the record of appeal.

[37] Yet another troubling issue is the matter of service of the relevant documents on the appellant. The respondent had relied on the last known address as indicated in the loan documents. The evidence however, plainly show that the respondent was in receipt of the notice of redemption wherein the appellant's latest address was clearly imprinted. It must therefore be taken to have been aware of this address or at least, put on notice in that regard.

[38] In our view, having relied on the notice of redemption and having accepted payment for which the respondent was thus seeking the agreement of the DGI to keep the payment and treat the loan as redeemed and the charge lifted, we find that good conscience and the rules of equity militate against the granting of the respondent's application for an order for sale of the said property. These are strong and compelling reasons to justify the withholding of the relief sought under s 256 of the Code.

[39] While the procedure under s 256 is meant to be speedy and summary in nature, the learned judge hearing such applications for an order for a judicial sale, must nevertheless be concerned as to whether the appellant has been properly served; that the procedural requirements of O 83 of the Rules of Court 2012 have been complied with; and that within the 'very narrow question whether the material produced before him by the chargor constitutes cause to the contrary'. The learned judge is required to carry out a careful and objective assessment of the factual material placed before the court. The judge is however, not required to express any view on the merits of any or all of the points taken by the appellant, 'save to say whether, having regard to the three narrow categories ... laid down ... and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction'. The judge 'does not make, and in any event ought not to make, any adjudication upon any substantive issue' — see Supreme Court in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119.

[40] Although the learned judge in the present appeal address the matter of service and compliance with the requirements of O 83 and the National Land Code, which consideration we find to have been erroneous given the factual matrix, more significantly, the learned judge had failed to carry out the requisite assessment of the factual material placed before the court so as to decide the very narrow question of whether such material produced by the appellant constitutes cause to the contrary. Had the learned judge undertaken that exercise, and had done so carefully and objectively, the learned judge would have found, as we have, that the appellant had in fact satisfactorily

shown cause to the contrary as to why the relief under s 256 of the Code ought to be withheld from the respondent; that the appellant's complaints fall within the principle in *Murugappa Chettiar*'s case.

[41] The evidence produced showed that the redemption sum had been fully paid up, that the respondent had every intention of lifting the charge, and that it kept the redemption sum for a substantial period before approaching the DGI to sanction its actions. After it had failed in procuring the DGI's sanction, the respondent never advised the appellant or the appellant's wife about the state of affairs; it even failed to respond to the appellant's letters. The circumstances presented in the instant appeal are not dissimilar to those that arose in *Overseas Chinese Banking Corporation Ltd v Lee Tan Hwa*. There, the bank with prior knowledge (acquired through common solicitors), that the chargor had entered into agreements with sub-purchasers for the sale of a portion of the land to them, accepted the creation of a registered charge in its favour as security for a loan made to the chargor. When the chargor defaulted, the bank applied for an order for sale under s 256 of the Code. The sub-purchasers intervened and opposed the application.

[42] Although fraud was not found, the learned chief justice nevertheless refused the bank's application for the following reasons:

> Under the circumstances, I hold that the plaintiff knew through their solicitors that the interveners were purchasers of a portion of the land. The charge of the whole land to the plaintiff could not be a valid charge since a substantial portion of it was not absolutely owned by the two defendants. There is nothing to prevent the plaintiff from proceeding against the defendants or any party who was negligent in handling the charge transactions.
>
> Now that the first intervener had completed the purchase and had gone into possession, it would not be justified and would be plainly unconscionable to deprive him of the shophouse he had bought by holding that the charge was valid when in fact it was void, and consequently I refused to grant the plaintiff's application to have the land sold by public auction.

[43] Similarly, the principle in *Murugappa Chettiar*'s case applies in this appeal.

[44] Learned counsel for the respondent had further submitted that the monies paid by the appellant's wife be held under a *Quistclose* trust. We do not find it necessary to address this issue as this is entirely for the appellant's wife to take up as an action in personam. It would be outside the ambit of the present appeal to consider that issue on the merits or make the orders suggested.

[45] Suffice to say that learned senior federal counsel from the office of the DGI had advised us that by its letter dated 18 January 2018, the DGI had

informed the respondent that it was agreeable to the respondent's proposal to redeem the charge on the two terms expressed therein (there was a third term which has since been withdrawn). Those terms being that the DGI will pay the sum of RM167,296.75 in settlement of the outstanding loans with the respondent; and that the respondent will deliver the title to the said property free from the registered charge for the action of the DGI. This letter containing the aforesaid terms was tendered as exh 'A' in these proceedings. Seeing that the respondent was still intent in redeeming the charge, we find strong compelling reasons to warrant and justify the refusal of the respondent's application.

[46] For all the foregoing reasons, and on the terms set out in exh A, we unanimously allow the appeal with no order as to costs. The decision of the High Court is set aside.

Appeal allowed; High Court's decision set aside.

Reported by Ashok Kumar